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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1251

STANDARD OIL COMPANY OF CALIFORNIA,

Appellant,

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of California

Reply by Standard Oil Company of California to Memorandum for the United States in Response to Motion to Recall Mandate of This Court and to Grant Leave to the District Court to Consider a Motion to Set Aside Its Judgment for Fraud Upon the Court

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STANDARD OIL COMPANY OF CALIFORNIA ("Standard") files this reply to the memorandum for the United States.

The United States does not oppose a hearing in the District Court (Gov.Mem. 3). However, it contends: (a) the hearing in the District Court should be limited to a claim of *willful* misconduct by United States counsel (Gov.Mem.

3, 15); and (b) this Court, instead of recalling its mandate and granting leave, should hold that the District Court has power to entertain the motion (Gov.Mem. 7). Neither contention has merit.

A. Misconduct by McCook, Turnbull and Lynn:

The United States seeks to isolate the judgment and the findings below from the misconduct by McCook, Turnbull and Lynn. First, it states (Gov.Mem. 11) that the misconduct of the two witnesses and their attorney is merely "newly discovered evidence" under Rule 60(b)(2), and that relief is time barred because the motion was not made within one year after entry of the judgment below. Second, it states (Gov.Mem. 11, 12) that since even perjury by a party, or by a non-party witness, does not constitute a fraud upon the court, the failure by McCook, Turnbull and Lynn to turn over documents in their possession, which would have aided Standard, does not constitute such fraud. The United States is wrong, on both counts:

First, the misconduct by McCook, Turnbull and Lynn was not just "newly discovered evidence." The misconduct was the failure to produce evidence; it included (1) disobedience by McCook and his attorney, Lynn, to subpoenas duces tecum; (2) false representations by Lynn, an officer of the court; (3) false representations by Turnbull, through Lynn; (4) failure by Turnbull to provide to Standard documents that were in his files prior to trial, including documents that he delivered to private attorneys for review; (5) failure by Turnbull to provide to Standard documents that he delivered to the United States, post trial. Because at least one attorney, Lynn, was implicated, this conduct satisfies Moore's definition:

> "• • • [the attorney's] loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case, he perpetrates a

> fraud upon the court" (7 Moore's *Federal Practice* (2d Ed. 1975) par. 60.33, p. 513).[1]

While the definition of "fraud upon the court" is not precise (*Toscano v. C. I. R.* (9 Cir. 1971) 441 F.2d 930, 933-934), it encompasses, or should encompass, tampering as here (Standard Brief 15-17, 49-65) with the administration of justice (*Hazel-Atlas v. Hartford Co.* (1944) 322 U.S. 238, 248; *Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1963) 320 F.2d 594, 608-610; *Toscano v. C. I. R.* (9 Cir. 1971) 441 F.2d 930, 934-935).

Second, perjury taints the judicial process and, contrary to the United States' assertion, warrants relief (*Imbler v. Pachtman* (1976) 96 S.Ct. 984, 995, n. 34; *Mesarosh v. United States* (1956) 352 U.S. 1, 9). As stated by this Court in *Mesarosh* with respect to perjured testimony:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial" (352 U.S. 1, 9).

It added:

> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them" (352 U.S. 1, 14).[2]

---

1. See *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 247; *H. K. Porter Co. Inc. v. Goodyear Tire & Rubber Co.* (6 Cir. 1976) 536 F.2d 1115, 1119 ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court").

2. Because the fraud was not disclosed, but concealed by the false representations by Lynn, and by the failure by the United States to disclose the documents delivered to it by Turnbull post-trial—the delivery occurring four months after this Court affirmed the judgment of the District Court, and within the one year period for a motion under Rule 60(b)(2) or 60(b)(3)—it may be questioned whether a motion, if made pursuant to subdivisions (b)(2) or (b)(3) (rather than pursuant to Rule 60(b)(6)), would be time barred, in view of a possible fraudulent concealment tolling the one-year period (cf. *Holmberg v. Armbrecht* (1946) 327 U.S. 392, 396-397).

The United States contends (Gov.Mem. 12) that it should not be required to relitigate the case because of misconduct by third party witnesses, at this late date; however, in *Mesarosh v. United States* (1956) 352 U.S. 1, 9-10, where but one of seven witnesses may have testified untruthfully, this Court, rejecting a partial concession by the United States that the case be remanded to the District Court for full consideration of the credibility of the witness's testimony, ordered a new trial. And in *Communist Party v. Control Board* (1956) 351 U.S. 115, 124-125, where but three of twenty-two witnesses for the United States were alleged to have perjured themselves, this Court ordered a hearing to determine if perjury had been committed; if perjury had been committed, the Court ordered that the testimony not be left part of the record, and that the Subversive Activities Control Board reconsider its original determination in light of the record as freed from the perjured testimony. This Court stated:

> "The untainted administration of justice is * * * one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. * * * [F]astidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted";

and that:

> "* * * it does not remove the taint for a reviewing court to find that there is ample innocent testimony to support the Board's findings. If these witnesses in fact committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account. * * * We find it necessary to dispose of the case on the grounds we do, not in order to avoid a constitutional adjudication but because the fair administration of justice requires it" (351 U.S. 115, 124-125).

A withholding of evidence affects the administration of justice, in many instances, more adversely than perjury; it prevents a party from discovering and presenting the facts, fully or adequately.

Further, the United States suggests (Gov.Mem. 13) that Standard has a remedy against McCook, in that the judgment in the suit by the United States is only "prima facie" evidence in the pending treble damage suit, and that Standard can use the newly discovered documents to rebut such evidence. But this begs the question: McCook, who suppressed evidence in this suit, knowing that he was going to rely on the judgment, should not now be permitted to use that judgment. If Turnbull, in addition, deceived the United States by failing to produce all his documents for it—which the United States now claims (Gov.App. 1a-2a) —the United States should not be willing to let the deceit go uncorrected in this suit (cf. *Napue v. Illinois* (1959) 360 U.S. 264, 269).[3]

Were there no sanctions, in the suit by the United States, against a witness like McCook who anticipated a treble

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3. Turnbull was McCook's agent, or "legman," for the preparation of the treble damage suit against Standard since 1968 or 1969 (A. 509); in delivering documents to the United States, he was acting on behalf of McCook (A. 509). If there is a judgment for McCook in the treble damage suit, Turnbull will be "well compensated" by McCook (A. 509); Turnbull will split any recovery, after expenses (McCook Dep., September 24, 1975, pp. 231-232).

damage suit, that witness would benefit from his own unclean hands if he were permitted to offer the judgment in evidence under Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), in the subsequent treble damage suit. If the evidence were suppressed, and not disclosed, he would benefit from the findings and judgment; if the evidence were subsequently disclosed and a new trial granted, he would be in no worse position than if he had disclosed the evidence in the first instance. If the evidence were disclosed one year after judgment, relief under Rule 60(b)(2) and (3) would be time barred—in the United States' view (Gov.Mem. 11)—and plaintiff would be permitted to use the judgment.[4]

Finally, the United States argues (Gov.Mem. 12, n. 14) that neither *District of Columbia v. Stackhouse* (D.C.Cir. 1956) 239 F.2d 62, nor *Precision Co. v. Automotive Co.* (1945) 324 U.S. 806, cited by Standard, is authority for vacating a final judgment on grounds of fraud by a third party witness, where the fraud was not known to either of the parties. These cases were cited to show the types of equitable relief available to Standard, i.e., to strike a

4. McCook waited until 11 months after the judgment of the District Court was affirmed by this Court before he filed the treble damage suit (A. 713). He then moved for summary judgment against Standard without disclosure of the new documents (A. 525, 529), arguing that the prior judgment was conclusive evidence of Standard's liability:

> "Standard's blatant failure to produce before this Court any truly new, previously unobtainable evidence to rebut plaintiff's liability case • • • constitutes a failure to raise any genuine issue of material fact. The evidence presented in the government action has already been evaluated by Judge Conti and subsumed under his Findings and Judgment, which now constitute plaintiff's 'evidence'" (A. 739-740).

As noted in Standard's brief (p. 4), the District Court denied the motion, holding that Standard was entitled to a jury trial.

finding or deny prospective use of a judgment (see *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 245: "where courts have exercised the [equity power over judgments obtained by fraud], the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it")—not the grounds for relief. As to the grounds for relief, Moore states:

> "Granted that a judgment produced by the fraud, misrepresentation, or other misconduct of an independent third person is unjust • • • we believe that • • • Rule [60(b)] does afford the means for relief either under • • • clause (6); or, if the fraud is of such a character that it may be termed a fraud upon the court, then under the power of the court • • • to give relief from this type of fraud" (7 Moore's *Federal Practice* (2d Ed. 1975) par. 60.24 [5], pp. 291-292).

For the reasons stated above and in Standard's brief (pp. 39-42), we submit that the facts as to McCook, Turnbull and Lynn warrant setting aside the judgment or, at a minimum, expunging that part of Finding 67 (A. 774) which is based upon the testimony of McCook, and denying prospective use of the judgment to McCook in the treble damage suit (see *Keystone Co. v. Excavator Co.* (1933) 290 U.S. 240, 245-247).

B. Misconduct by the United States:

The United States represents (Gov.Mem. 13) that the question whether all types of misconduct by a party's attorney constitute fraud upon the court under Rule 60(b) is unresolved, and urges that "• • • a court might well

conclude that not all misconduct by a lawyer ordinarily constitutes such fraud." But whether all types of misconduct constitute fraud upon the court is not in issue.

The United States is charged with specific misconduct: (a) failure to produce documents, prior to trial, requested by motion to produce; (b) false representations, prior to trial, that it saw no further documents when, if Turnbull is telling the truth, it did; (3) failure to produce documents, post trial, required by court order.

The failure by the United States to produce material evidence, upon request, warrants relief regardless of the good faith or bad faith of the United States (*Brady v. Maryland* (1963) 373 U.S. 83, 87-88; *United States v. Agurs* (June 24, 1976) 44 U.S. Law Week 5013, 5015). This rule applies to a failure to produce, upon request, specific documents as in the present case, or evidence whose high probative value could not have escaped the United States' attention (*United States v. Agurs* (June 24, 1976) 44 U.S. Law Week 5013, 5015; *United States v. Keogh* (2 Cir. 1968) 391 F.2d 138, 146-147). Further, the negligent failure by the United States to produce material evidence, where requested, is ground for setting aside a judgment (*Brady v. Maryland* (1963) 373 U.S. 83, 87-88; *United States v. Consolidated Laundries Corporation* (2 Cir. 1961) 291 F.2d 563, 570).

In *Agurs,* discussing the function of a specific request, this Court stated (44 U.S. Law Week 5013, 5016):

> "* * * if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[5]

The United States contends (Gov.Mem. 14) that the negligent suppression of exculpatory evidence would, at most, support a claim of newly discovered evidence, which is barred by the one year limitation of Rule 60(b)(2), but not fraud upon the court. This position, we believe, is inappropriate for the United States (*United States v. Consolidated Laundries Corporation* (2 Cir. 1961) 291 F.2d 563,

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5. The United States contends (Gov.Mem. 14) that it is unclear whether Standard is charging the United States with willful misconduct, or merely with negligence, citing an incomplete portion of the transcript in the District Court at the first hearing on the United States' motion for a protective order (A. 740). The transcript shows the following:

> "THE COURT: Mr. Klitgaard, are you contending that Mr. Hollander intentionally suppressed relevant documents?
>
> "MR. KLITGAARD [counsel for Standard]: We are not contending that, your Honor. We are simply trying to find out what Mr. Turnbull—
>
> "THE COURT: All right, you have answered my question" (A. 742).

At the rehearing on the motion for the protective order four weeks later, after Standard had discovered further new documents in the files of private antitrust counsel employed by McCook and Turnbull during the prior suit (A. 748; A. 122-123, 124, 125, 141, 152, 153, 154, 155, 158, 160, 161, 162, 170-171, 172-173, 177, 182, 183, 186-188, 200-220, 228, 229-230, 256, 261, 262-263), and after Standard had informed the Court that Turnbull had testified that he had not delivered any documents to those attorneys that he had not delivered to the United States (A. 731), Standard stated:

> "It is our position in this case that there was a suppression by McCook, Turnbull and Lynn in the prior case * * *" (A. 749);

and added:

> "The matter is complicated to some degree by a suppression of the Government both post-trial, as shown by its own records, by the documents produced in Mr. Hollander's affidavit, and pretrial if the testimony of Mr. Turnbull is to be believed" (A. 749).

571; *United States v. Zborowski* (2 Cir. 1959) 271 F.2d 661, 667-668; cf. *Bros Incorporated v. W. E. Grace Manufacturing Company* (5 Cir. 1965) 351 F.2d 208, 211). If the United States in fact negligently suppressed evidence despite a motion to produce, repeated specific requests for documents, and a subsequent post-trial court order, the judgment is tainted and the United States, we submit, should want to have the judgment set aside and provide Standard with a full opportunity to present its defense (cf. *Mesarosh v. United States* (1956) 352 U.S. 1, 4).[6]

The United States, referring (Gov.Mem. 14) to the cases cited by Standard where judgments have been set aside because of the United States' failure to produce exculpatory material in its possession, states that these cases were all criminal cases which "implicate the constitutional rights" of the defendant and involve "quite different considerations" from Standard's attempt to vacate the judgment in the United States' civil antitrust suit.

First, a civil suit by the United States under the Sherman Act is a quasi-criminal proceeding (see *State of Iowa v. Union Asphalt & Roadoils, Inc.* (S.D.Iowa 1968) 281 F.Supp. 391, 407; *In re Petroleum Industry Investigation* (E.D.Va. 1957) 152 F.Supp. 646, 647).

Second, the requirement of due process is not limited to criminal prosecutions but applies to civil cases as well (e.g., *Boyd v. United States* (1886) 116 U.S. 616, 634; *Brinkerhoff-Faris Co. v. Hill* (1930) 281 U.S. 673, 679-682;

6. Indeed, if the one-year period were applicable and had run, it would be because the United States, within the one-year period, failed to disclose to Standard the fact that it had received new documents previously unproduced from Turnbull, post trial. Had the United States immediately, and forthrightly, brought these documents to the attention of Standard, or informed the District Court of their existence, Standard would have been in a position to seek relief within the one-year period. Instead, the United States now contends as a defense to Standard's motion that Turnbull, who once had knowledge of the facts, can no longer remember them (Gov.App. 1a-2a; see also A. 724).

Equal Employ. Op. Com'n. v. Los Alamos Constructors, Inc. (D.N.M. 1974) 382 F.Supp. 1373, 1383, n. 5) and "[w]hatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard" (*Frank v. Mangum* (1915) 237 U.S. 309, 347, Holmes, J., dissenting).

Finally, the United States contends (Gov.Mem. 14) that evaluation of Standard's charges against the United States would require a detailed analysis by the District Court of a substantial amount of documentary material and testimony, involving comparison of the newly discovered evidence with the evidence at trial. At the same time, it asks this Court to rule, without a full factual record, that the standard for culpability by the United States be limited to a claim of willful misconduct by United States' counsel. We believe that the proper procedure is first to develop the factual record, then determine and apply the standards (*United States v. Shotwell Mfg. Co.* (1957) 355 U.S. 233, 241; *Campbell v. United States* (1961) 365 U.S. 85, 98). In *Shotwell*, where this procedure was followed, this Court stated:

> "In these circumstances it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less" (355 U.S. 233, 241).[7]

7. The United States, in an appendix to its memorandum, seeks to demonstrate (Gov.App. 1a) that the evidence refutes the allegations of misconduct by the United States. Standard's brief outlines the evidence, to date, of misconduct (pp. 29-36, 49-65), and in the addendum to this reply (pp. 15-18, *infra*), we set forth evidence which rebuts the United States' contentions.

Further, the United States argues (Gov.Mem. 13) that none of the new documents presents new exculpatory information for Standard, and (Gov.App. 5a) that none of the new documents contains information that was unavailable to Standard at the time of the United States' suit. In reply, we refer the Court to the review of the documents in Standard's brief (pp. 18-28) and to the brief additional comments in the addendum hereto (pp. 18-20, *infra*).

C. Recall of Mandate; Leave to File Motion:

The United States argues (Gov.Mem. 7) that it is inappropriate, and unnecessary, for this Court to recall its mandate to permit the District Court to grant effective relief. It further asks this Court to rule that leave of the appellate court is not required to file a motion under Rule 60(b) to vacate a judgment, where the judgment has been affirmed on appeal (Gov.Mem. 7). As to the latter point, the United States concedes (Gov.Mem. 5, n. 7) that its request is inconsistent with the decisions of the Courts of Appeals for six of the seven Circuits that have decided the question. Both rulings would also be inconsistent with prior decisions of this Court (*Southard v. Russell* (1853) 57 U.S. (16 How.) 547, 570; *In re Sanford Fork & Tool Co.* (1895) 160 U.S. 247, 255; *In re Potts* (1897) 166 U.S. 263, 267-268; *National Brake Co. v. Christensen* (1921) 254 U.S. 425, 430-432; *Duke Power Co. v. Greenwood Co.* (1936) 299 U.S. 259, 267-268; *Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 248).

We believe that the existing procedures are supported by sound reasons (*Southard v. Russell* (1853) 57 U.S. (16 How.) 547, 570; *Tribble v. Bruin* (4 Cir. 1960) 279 F.2d 424, 427-428; see also 7 Moore's *Federal Practice* (2d Ed. 1975) par. 60.30[2], pp. 425-429) and accord proper deference to the appellate court (*Simmons Co. v. Grier Bros. Co.* (1922) 258 U.S. 82, 91). Accordingly, we submit that the appropriate relief is to grant the motion to recall the mandate of this Court and grant leave to the District Court to consider Standard's motion to set aside the judgment.

If, however, this Court should overrule its prior decisions and hold that leave of the Court is not required before Standard may file its motion in the District Court,

and that the District Court may grant relief without recall of the mandate, this Court should enter an order directing the District Court to entertain the motion, take testimony, make findings and decree appropriate relief.

CONCLUSION

The motion to recall the mandate of this Court and to grant leave to the District Court to consider a motion under Rule 60(b) should be granted.

Dated: September 17, 1976.

Respectfully submitted,

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Addendum

1. United States Memorandum, "Appendix A": Misconduct by the United States:

The United States contends (Gov.App. 1a) that Standard's charge of wrongdoing by the United States' trial attorney is based solely upon testimony given by Mr. Turnbull in November, 1975; it states that Mr. Turnbull's "entire testimony shows that Turnbull was not testifying to a specific recollection, but from an 'assumption,' a mental reconstruction of what he thought must have happened." The United States is wrong, for two reasons: *First*, Mr. Turnbull testified as to an assumption only as to whether the United States' trial attorney took all of the documents which were provided to him at Mr. Turnbull's office.[8] If the United States looked at documents, but did not take them, this is further evidence that the United States was aware, as early as 1969, that Turnbull still had additional

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8. Mr. Turnbull testified:

"Q. • • • [W]as [SDX 93-96] among the documents you turned over to Mr. Hollander?

"A. I don't know. I am saying everything was back there for him to take, so it would be an assumption on my part that he took them" (A. 596).

He also testified:

"Q. • • • [W]hen Mr. Hollander came to your office, did he just ask to see the documents that passed back and forth between you and Governor Lee, or did he ask you to see all your files on American Samoa?

"A. All the files.

"Q. How did he phrase that? Did he ask to see all your documents concerning American Samoa?

"A. Everything, yes.

"Q. Involving petroleum products, that is?

"A. Yes" (A. 563).

and that:

"When he took all of the material, he says, 'I am going to look through this file, and I am only going to take out what I want to take out of it.' So he took it" (A. 566).

documents. *Second*, Turnbull testified, document by document, as to the documents that he made available (Standard Brief 34); he testified, without qualification, that he did not deliver any documents to Lynn, or to the private attorneys in San Diego, that he did not also deliver to Mr. Hollander (Standard Brief 33-34); yet documents were found in the files of both attorneys in the present treble damage suit which the United States did not produce to Standard (Standard Brief 70).

The United States contends (Gov.App. 2a) that the reliability of Turnbull's present recollection, that he turned over to the United States all the documents recently produced to Standard, is weakened by (a) the receipt given by the United States to Turnbull in October, 1969, for documents, and (b) the receipt signed by Turnbull in November, 1969, upon return of the documents. Mr. Turnbull, to the contrary, testified that he recalled receiving two packages of documents from Mr. Hollander: one, a smaller package, second a larger package. He testified:

> "When Mr. Hollander came to my office, he said, 'I want all you have,' and I said it doesn't all apply to you. 'That's okay, I will take it back to Washington, look through it and give you back the things and only take out what we need.'
>
> * * * * *
>
> "So I got two sets or three sets of documents. I think the first batch was stuff he didn't use.
>
> "Q. And the second batch was Tu-
>
> "A. Then I got the Tu numbers.[9]
>
> "Q. And was that in the second batch?

9. The documents with "Tu" numbers were the documents produced by the United States for Standard in April, 1970, from the files of Turnbull (Standard Brief 50).

> "A. I think it was in the second batch" (A. 578).

He further testified:

> "Q. By * * * the 1st of April, 1971, had you received back from Mr. Hollander the documents which you had given to him?
>
> "A. Yes.
>
> "Q. And you received those back in two envelopes; correct?
>
> "A. Different times, yes.
>
> "Q. One big envelope and one thin envelope?
>
> "A. One larger than the other, yes" (A. 588-589).

As to the failure by the United States to produce documents post trial, under the Court's order, the United States admits (Gov.App. 3a) that it did not deliver to Standard the documents attached to the Turnbull letter dated October 4, 1973 (A. 436-457). It states (Gov.App. 3a) that the attached documents were not turned over to Standard because they did not relate to Standard's relief plan, but instead sought to promote a project which Turnbull had been "pushing" for a number of years at Nu'Uli Lagoon (A. 437-457). To the contrary, the documents related directly to the relief plan, and to the issues at trial (Standard Brief 35-36, 63-65).

The United States further argues (Gov.App. 4a) that the text of the letter dated October 4, 1973, from Turnbull described the attached documents, and that the existence of the documents was shown by a reference to "14 Enclosures" at the bottom[10]. However, the letter on its face did not show that the enclosures related to petroleum supply in American Samoa, or to the period 1963-1965; instead, the letter described the enclosures as relating solely to dredging (A. 436). To quote the letter:

10. The 14 enclosures were 2 photographs, and 12 letters or memoranda between Turnbull and Dillingham dated 1963-1965 (A. 437-457).

"It is proposed that Nu'Uli Lagoon be dredged and the dredged material used as backfill to create eighty five new acres of deep water frontage. Both industry and government can share the cost. *Attached hereto is some correspondence with Dillingham on the feasibility of such a project*" (emphasis added) (A. 436).[11]

Finally, the United States argues (Gov.App. 4a) that its failure to produce the enclosures did not violate the District Court's order, because the attachments to Turnbull's letter would not have supported Standard's proposal for relief. However, the United States was obliged to make a complete disclosure not a partial one (cf. *Griffin v. United States* (D.C.Cir. 1950) 183 F.2d 990, 993: "• • • the prosecution is not to decide for the court what is admissible or for the defense what is useful").

2. United States Memorandum, "Appendix B": Information Not Available to Standard at Trial:

The United States contends (Gov.App. 5a) that the absence of the documents did not affect the result of the original trial, although it concedes that its analysis of the documents is not decisive of the issues presented by Standard in the motion. In any event, this Court in *Hazel-Atlas* held that parties who commit a fraud upon the court are in no position to question its effectiveness (*Hazel-Atlas Co. v. Hartford Co.* (1944) 322 U.S. 238, 247).

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11. At the hearing on relief, October 23, 1973, the United States suggested (A. 460-461) to the District Court that suppliers had submitted comments to the United States on Standard's plan in confidence. The District Court ordered the United States to send the letters to Standard, but added: "If they write a letter to [the United States] in confidence because of certain business secrets • • • or certain procedures, then • • • let me read it *in camera* and decide" (A. 462). We do not understand the United States to contend that the 14 enclosures were submitted to it in confidence, or that having submitted them to the District Court, they were withheld on court order.

The United States argues (Gov.App. 5a) that Standard's analysis of certain new documents is based upon a selective statement of facts and previous evidence. This is not true; a cursory glance at these documents shows the conflicts between them, the testimony by McCook and Turnbull, and the documents initially produced by Turnbull (Standard Brief 19-28). Other documents also were exculpatory. For example, the United States argues (Gov.App. 8a) that it was the October 25, 1965, price reduction on diesel fuel to the Government of American Samoa, and McCook's realization that Standard would better any offer he could make, that dissuaded McCook from entering the market. Yet a document not produced in the prior case shows that Turnbull and McCook foresaw competition, including a price reduction, at the time McCook submitted his proposal:

"Our interest in establishing the facility is geared to supplying all of the government's and industry's requirements through a reasonable period of investment return. • • • [*I*]*n the absence of contracts to protect ourselves, we would be exposed to temporary price cutting* [by Standard] • • •" (emphasis added) (A. 184).

Finally, the United States argues (Gov.Mem. 13, n. 15; Gov. App. 10a) that the documents by Standard are "mostly" cumulative, and do not contain any new evidence. However, the documents include, *inter alia*, the following new evidence:

(a) contacts between McCook and Governor Lee following McCook's proposal, not disclosed before (A. 189, 190);

(b) details on financing, not disclosed before (A. 172, 174);

(c) details on inquiries concerning the financial

strength of McCook's supplier, not disclosed before (A. 186-189);

(d) statement that Turnbull and his associates were ready, subject to the Governor's approval, to construct a petroleum terminal in Samoa after Standard's price reductions (A. 191);

(e) facts concerning a possible Shell-Turnbull venture, heretofore undisclosed, in August, 1965, indicating that Shell was not foreclosed from the market (A. 177, 183); and

(f) details concerning a secret split of profits between Turnbull and McCook's supplier (A. 174, 176, 178-179, 180).

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